

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 July 2003

CASE NO.: 2002-SCA-11

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR,
Complainant

v.

CHARLES D. CANTERBURY,
Respondent

APPEARANCES:

Francine A. Serafin, Esq.
For the United States Department of Labor

Charles D. Canterbury,
Pro se

Before: DANIEL L. LELAND
Administrative Law Judge

**DECISION AND ORDER - GRANTING MOTIONS FOR SANCTIONS AND SUMMARY
JUDGMENT**

This proceeding arises under the McNamara-O'Hara Service Contract Act (SCA) (41 U.S.C. § 351, *et seq.*), the Contract Work Hours and Safety Standards Act (CWHSSA) (40 U.S.C. § 327 *et seq.*) and applicable regulations issued at 29 C.F.R. Parts 4, 5, 6, and 18.

PROCEDURAL HISTORY

The Department of Labor (Department) filed a complaint in this Office against Respondent on July 5, 2002, alleging that Respondent had violated the SCA and its regulations. On August 6, 2002, Respondent filed his Answer. The Department served its First Set of Interrogatories, First Request for Admissions, and First Request for Production of Documents and Things on September 30, 2002. A hearing was scheduled for April 29-May 1, 2003 in Lewisburg, West Virginia before the undersigned.

On April 10, 2003, the Department filed a Motion for Summary Judgment, arguing that Respondent did not respond to its Request for Admissions within thirty days, and thus they are deemed admitted pursuant to 29 C.F.R. § 18.20. The Department further argued that, based on those admissions being deemed admitted, it was entitled to summary judgment as a matter of law. Claimant filed a response on April 16, 2003, arguing that he thought his attorney had submitted his responses to the Department's discovery requests before he withdrew as counsel. On April 21, 2003, I issued an Order denying the Department's Motion for Summary Judgment, based on Respondent's *pro se* status, the Department's failure to file a Motion to Compel Discovery, and the Department's failure to contact Respondent to obtain his responses to its discovery requests.

By facsimile on April 23, 2003, the Department filed a Motion for Reconsideration, or in the Alternative, Motion for Continuance. On April 24, 2003, I issued an Order denying the Motion for Reconsideration and granting the Motion for Continuance. I also ordered the Respondent to respond to the Department's Requests for Admissions, Interrogatories, and Request for Production of Documents within thirty days, or else face sanctions under 29 C.F.R. § 18.6(d)(2).

On June 16, 2003, the Department filed a Motion for Sanctions and Second Motion for Summary Judgment. The Department alleges that Respondent has still not responded to its discovery requests, despite my April 24, 2003 Order instructing him to do so, and thus it requests as sanctions an order: (1) deeming as admitted the matters in its First Request for Admissions, (2) inferring that the responses to its discovery requests would have been adverse to Respondent, (3) prohibiting Respondent from offering into the record any evidence or testimony regarding any matter that would have been identified in responses to its discovery requests, and (4) prohibiting Respondent from raising any objection to any secondary evidence offered by the Department to show what the withheld responses to its discovery requests would have shown. *Department of Labor's Motion for Sanctions and Second Motion for Summary Judgment*, pp. 1-2. Further, the Department argues that if the admissions are deemed admitted, then it is entitled to summary judgment because the admissions conclusively establish each element of its case, and therefore there is no genuine issue of material fact for the hearing. Respondent has not filed a response to the Department's Motions.

DISCUSSION

Motion for Sanctions

Section 18.6(d)(2) states that if a party fails to comply with an order to produce documents or answer interrogatories or requests for admissions, then the administrative law judge may take such action as is just, including:

- (1) infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;

(2) rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;

(3) rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(4) rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown;

(5) rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

In my April 24, 2003 Order, I ordered Respondent to respond to the Department's Request for Admissions, Interrogatories, and Requests for Production of Documents within thirty days. Respondent was also put on notice that failure to respond would result in sanctions pursuant to § 18.6(d)(2). The Department avers in its Motion for Sanctions filed June 16, 2003, that Respondent has not submitted his responses to its discovery requests. It has been over two months, and Respondent has failed to comply with the Order. I find that sanctions are an appropriate remedy for Respondent's noncompliance. Therefore, the Department's Motion for Sanctions is GRANTED and its requested sanctions are adopted *in toto*.

Motion for Summary Judgment

A motion for summary decision is governed by §§ 18.40 and 18.41. An administrative law judge may enter summary decision where "there is no genuine issue as to any material fact." § 18.41. A party opposing a motion for summary decision "may not rest upon the mere allegations or denials of its pleading. Such response must set forth specific facts showing that there is a genuine issue of material fact for the hearing." § 18.40(c); *see also Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)(discussing the analogous Federal Rule of Civil Procedure 56(e)). However, even if the non-moving party fails to present such facts, summary decision is not appropriate unless the moving party is otherwise entitled to summary decision; in other words, the moving party must not only show an absence of disputed facts, but that based on the undisputed facts it is entitled to favorable judgment. *See* § 18.40(d). The determination of whether a genuine issue of material fact exists must be made in the light most favorable to the non-moving party. *Agristor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987).

Since I granted the Department's Motion for Sanctions, and all of the matters contained in its Request for Admissions are deemed admitted, the facts are undisputed in this case.

Respondent contracted with the United States Postal Service (USPS) as a mail delivery contractor during the period from June 17, 1998 until June 30, 2002. *See* Admission No. 1. The contracts were each in amounts in excess of \$2,500, and they were provided for the furnishing of mail delivery services. *See* Admission Nos. 5, 6. The mail delivery services were provided through the use of service employees as defined by Section 8(b) of the Service Contract Act. *See* Admission No. 7. Respondent contracted with the USPS in his individual capacity, and he had the authority to hire and fire employees who worked on the contracts, to determine which contracts the employees worked on and how many hours per week they worked, and to pay the employees. *See* Admission Nos. 19, 20, 22. During all times relevant to these contracts, Respondent was responsible for ensuring that the legal requirements of the contracts were met. *See* Admission No. 23.

Wage Determination No. 77-0195 (Rev. 23), dated June 1, 1997, was incorporated into Contract Nos. 24940 and 249A1, and Wage Determination No. 77-0195 (Rev. 25) dated June 17, 1998, was incorporated into Contract No. 249A2.¹ *See* Admission Nos. 8, 9. Respondent's employees who worked on these contracts performed the services of "Driver/Caser." *See* Admission No. 12. Under the wage determination applicable to Contract Nos. 24940 and 249A1, employees classified as "Driver/Caser" were entitled to a minimum hourly wage of \$10.05 and \$1.16 per hour in health and welfare benefits for work performed on these contracts. *See* Admission Nos. 13, 15. Under the wage determination applicable to Contract No. 249A2, employees classified as "Driver/Caser" were entitled to a minimum hourly wage of \$11.01 and \$1.92 per hour in health and welfare benefits for work performed on this contract. *See* Admission Nos. 14, 16. Also, under the wage determinations, employees classified as "Driver/Caser" were to receive ten paid holidays per year. *See* Admission No. 17. Further, employees who work more than forty hours on the contracts in one work week were entitled to be compensated at a rate of one and one-half times their hourly wage. *See* Admission No. 18. During all times relevant to these contracts, Respondent was aware of the applicable wage determinations. *See* Admission No. 24. Respondent owes back wages in the amount of \$25,801.80 to four employees for work they performed under these contracts. *See* Admission Nos. 26-33. Respondent did not maintain records as to the number of hours worked by these employees. *See* Admission No. 34. After the Department's investigation, Respondent refused to pay any of the back wages found to be due. *See* Admission No. 36.

The undisputed facts establish that Respondent breached the contracts with the USPS and violated the SCA and its regulations when he failed to pay the employees the proper hourly wage, fringe benefits, and holiday pay. The undisputed facts also establish that Respondent is the party responsible for the SCA violations and thus is responsible for repaying the back wages. By reason

¹ According to the Complaint, Respondent was awarded Contract No. 24940, in the amount of \$23,028.39 per annum, on June 17, 1998, Contract No. 249A1, in the amount of \$16,821.12 per annum, on June 17, 1998, and Contract No. 249A2, in the amount of \$18,840.98 per annum, on September 30, 1998.

of his breach of contracts and violations of the SCA, Respondent is subject to section 5(a) of the SCA, 41 U.S.C. § 354(a), whereby Respondent and any firm, corporation, partnership, or association in which he has a substantial interest may be denied the award of any contract with the United States until three years have elapsed from the date of publication by the Comptroller General of an ineligibility list containing the name of Respondent. The record is devoid of facts which, if substantiated, could constitute unusual circumstances, relieving Respondent from the ineligibility provisions of section 5(a). Therefore, I find that there is no genuine issue of material fact for a hearing, and summary judgment is appropriate in this case.

ORDER

IT IS ORDERED THAT the Department's Motion for Sanctions is GRANTED. The following sanctions are imposed against Respondent:

1. The matters in the Department's First Request for Admissions are deemed admitted;
2. There shall be an inference that the responses to the Department's discovery requests would have been adverse to Respondent;
3. Respondent is prohibited from offering into the record any evidence or testimony regarding any matter that would have been identified in responses to the Department's discovery requests; and
4. Respondent is prohibited from raising any objection to any secondary evidence offered by the Department to show what the withheld responses to its discovery requests would have shown.

IT IS FURTHER ORDERED THAT the Department's Motion for Summary Judgment is GRANTED. Respondent is found to be in violation of the Service Contract Act and is liable for the repayment of \$25,801.80.

IT IS FURTHER ORDERED THAT the United States Postal Service release the \$10,796.48 withheld from Respondent to the Secretary of Labor in satisfaction of Respondent's obligation under this Order. Respondent is personally liable for the repayment of the remaining \$15,005.32.

IT IS FURTHER ORDERED THAT Respondent be placed on the ineligibility list pursuant to section 5(a) of the Service Contract Act.

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DANIEL L. LELAND
Administrative Law Judge

DLL/ljs

NOTICE OF APPEAL RIGHTS: Within 40 days after the date of this Decision and Order, any aggrieved party may file a petition for review with the Administrative Review Board, United States Department of Labor, Suite R-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210. A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, N.W., Washington, D.C., 20001-8002.